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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973.

No. 73-1019

CHARLES LESLIE DENNIS,

Petitioner,

vs.

J. M. WOOD, JR., P. E. BOWERS, AND A. ROBERT LOWRY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JURISDICTION.

The decision of the Court of Appeals was entered on November 2, 1973. On Petitioner's motion, the Court of Appeals has stayed its mandate until December 28, 1973. This Court has jurisdiction to review the decision herein by writ of certiorari under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the Court below erred in expanding the phrase "otherwise discipline" in Section 609 of Title VI of the Labor Management Reporting and Disclosure Act to proscribe summary suspension or removal of a union officer from office where this and the Circuit Courts agree that an identical phrase in Section 101(a)(5) of Title I does not prevent labor organizations from suspending or removing officers from union office.

STATUTE INVOLVED.

The relevant provisions of the National Labor Management Reporting and Disclosure Act[1] (73 Stat. 522, 29 U. S. C. § 401, *et seq.*) are set forth in Appendix "A", *infra.*

STATEMENT OF THE CASE.

A. The Nature of the Litigation.

On February 10, 1972, A. Robert Lowry, who had been suspended from office as an International Vice-President of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees ("BRAC") and as President of BRAC's Transportation-Communication Division ("T-C Division") filed suit against C. L. Dennis, International

1. Hereinafter sometimes referred to as "LMRDA" or "the Act."

President of BRAC, who ordered the suspension.[2] Count II of the Complaint[3] asserted, *inter alia*, that *Lowry's* suspension violated §§ 101(a)(1), 101(a)(2) and 609, LMRDA. Specifically, Plaintiffs alleged that Dennis had "obstructed and interfered with the aforesaid Lowry in the performance of his duties as Chief Executive Officer of the T-C Division" in various ways, such depriving him of office space and staff, withholding his salary and barring him from Executive Council meetings—all of which conduct Plaintiff characterized as "discipline." Paragraph 15 of Count II further alleged that Dennis' conduct was:

> for the purpose of depriving plaintiff of his rights as a member of the Union, and of his rights guaranteed under the provisions of the Labor-Management Reporting and Disclosure Act, *in that defendant has disciplined the plaintiff without due process* for speaking out and expressing his views, arguments and opinions with regard to the rights of the members of the T-C Division of BRAC guaranteed to them under the terms of the aforesaid merger agreement, and because plaintiff advised defendant on or around May 23, 1971, that plaintiff intended to become a candidate for the position of International President of BRAC at the expiration of the defendant's current term of office in 1975. [Emphasis added.]

On Friday, February 11, 1972, Lowry filed a motion for a temporary restraining order restoring him to his offices pending a hearing on his motion for a preliminary injunction, which he noticed for hearing on Monday, February 14. After a brief hearing, the District Court entered and continued the motion for a temporary restraining order to February 14. Shortly there-

2. Lowry was joined as Plaintiff by two Union members, J. M. Wood, Jr. and P. E. Bowers, who alleged that Lowry's suspension violated their rights as members under the Act. The Appeals Court affirmed the District Court's dismissal of this Count (Count I) and thus that issue is not before this Court.

3. Only Count II raises issues before this Court; Counts III and IV allege a violation of the Union Constitution and libel, respectively, the fact of which the Seventh Circuit held, "will be dependent upon the course of litigation with regard to Count II."

after, Dennis served Lowry with a formal notice of suspension setting forth the nature of the charges against him[4] and advising him of the hearing and appeals procedure which would be made available to him.[5]

On February 14, Dennis filed a motion to dismiss, or alternatively, to strike and dismiss portions of the Complaint and in opposition to Lowry's request for injunctive and other relief.

The motion to dismiss was predicated *inter alia* on the grounds that: (1) none of the actions of Dennis alleged in the Complaint deprived Lowry of any membership rights protected by the Act, "such provisions not protecting rights of Union officers as officers, but only the rights of Union members as 'members';" and (2) Plaintiffs had failed to exhaust or invoke reasonable remedies and hearing procedures available to them within the Union under the provisions of the BRAC Constitution (Article 5, § 2(c) and Article 16, §§ 6 through 18); and four months had not elapsed since disciplinary proceedings had been initiated against Lowry under Article 13 of the BRAC Constitution, as permitted by § 101(a)(4) of the LMRDA.[6]

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4. Lowry was charged with conduct unbecoming an officer; violations of the Grand Lodge Constitution and policies established pursuant thereto; and actions detrimental to the interest of the Brotherhood and its members. The notice informed Lowry that more specific written charges would be served upon him within thirty days after which he would be afforded a reasonable time to prepare a defense.

5. Specifically, he was advised that a hearing officer would be appointed, a hearing held at which Lowry could be represented by counsel and could present evidence and examine witnesses and a transcript would be made and provided to him.

6. The motion was supported by affidavits of C. L. Dennis, Marilyn Johnson, and D. J. Sullivan setting forth in detail the steps taken internally to resolve the problems which ultimately resulted in the charges brought against Lowry and the fact that, contrary to the allegations in the Complaint, Lowry was continuing to receive payroll checks from the Union.

B. The Decision of the District Court.

After extensive and exhaustive argument and reargument, Federal District Court Judge Napoli granted Dennis' motion to dismiss, finding that Lowry had been suspended from office but not from Union membership; and thus there was no violation of Title I, because as a Union member, Lowry was not precluded from speaking out in any Union meeting, and because he had the same rights as any other *member* to run for any and higher office. The Court also found that Lowry had an adequate internal method of presenting his aggrievement under Article 16, §§ 6 through 18 of the BRAC Constitution; and that the "internal Union remedies and hearing procedures available to Plaintiffs under the Union Constitution were fair, adequate and reasonable, including appeal rights thereunder." The District Court accordingly concluded that the Complaint should be dismissed for lack of jurisdiction, failure to state a claim upon which relief can be granted, and prematurity.

C. The Decision of the Court of Appeals.

The majority of a split Court[7] acknowledged that Title I of the Act "expressly contemplated that officers would be subject to summary removal without the safeguards guaranteed by § 101(a)(5) of Title I," but nonetheless interpreted virtually identical language of § 609 of Title VI[8] as protecting officers

7. The Court heard this case *en banc*. Two Judges dissented, Judges Knoch and Fairchild, with Judge Stevens who concurred with the result, in effect writing a dissent on the issue raised in this Petition.

8. § 101(a)(5) of Title I in pertinent part provides:

> SAFEGUARDS AGAINST IMPROPER DISCIPLINARY ACTION.—No member of any labor organization may be *fined, suspended, expelled or otherwise disciplined* * * * (emphasis added).

§ 609 of Title VI, Miscellaneous Provisions, in pertinent part provides:

> PROHIBITION ON CERTAIN DISCIPLINE BY LABOR ORGANIZATION—It shall be unlawful for any labor organization * * * *to fine, suspend, expel or otherwise discipline any of its members* * * * (emphasis added).

from removal from office "whether inflicted summarily or after a full panoply of procedural protections." The Court reaffirmed its interpretation of § 101(a)(5) as excluding "from its purview protection of the right to hold Union office" but concluded that § 609 guaranteed substantive rights and was far broader than § 101(a)(5) because of purported different purposes and rationales of the two sections." Thus, the Court conveniently overlooked the legislative history of § 609 establishing that it was intended to be "an enforcement section only, which provides no additional rights" (dissenting opinion, Appendix B, *infra*, p. A20). It held that the Complaint adequately stated a "limited right of action" and should not have been dismissed.

REASONS FOR GRANTING THE WRIT.

1. There Is a Direct Conflict Between the Seventh and Ninth Circuits on One Hand and the Third and Fifth Circuits on the Other.

All Courts of Appeals which have considered the matter have held that Title I and § 609 of Title VI of the Act protect the rights of union members as members, not as officers or employees of unions and that "membership rights" under Title I do not include the right to hold or remain in a union office.[9] The Fifth and Third Circuit have further held that a member is not "disciplined" within the meaning of § 101(a)(5) or § 609 of the Act if he is removed as an officer or employee. *Sheridan* v. *United Brotherhood of Carpenters*, 306 F. 2d 152 (3 Cir. 1962); *Martire* v. *Laborers' Local Union 1058*, 410 F. 2d 32 (3 Cir. 1969), cert. denied, 396 U. S. 903; *Sewell* v. *Grand Lodge of the I. A. M.*, 445 F. 2d 545 (5 Cir. 1971), cert.

9. See *Calhoon* v. *Harvey*, 379 U. S. 134, 85 S. Ct. 292 (1964); *Schonfeld* v. *Penza*, 477 F. 2d 899 (2 Cir. 1973); *Sheridan* v. *United Brotherhood of Carpenters*, 306 F. 2d 152 (3 Cir. 1962); *Sewell* v. *Grand Lodge*, 445 F. 2d 545 (5 Cir. 1971); *Air Line Stewards & Stewardesses* v. *Transport Workers Union*, 334 F. 2d 805 (7 Cir. 1964); *Grand Lodge I. A. M.* v. *King*, 335 F. 2d 340 (9 Cir. 1964) cert. denied, 85 S. Ct. 274 (1964).

denied, 404 U. S. 1024. The Ninth Circuit, joined in this case by the Seventh Circuit, agrees that the phrase "otherwise discipline" in § 101(a)(5) prevents the removal of an officer or employee, but by some prestidigitation concludes that the phrase "otherwise discipline" found in § 609 protects the rights of officers *qua* officers to remain in office. *Grand Lodge of the I. A. M.* v. *King*, 335 F. 2d 340 (9 Cir. 1964), cert. denied, 370 U. S. 920. Other Circuits which have considered the scope of Title I and § 609 have rendered decisions which are sufficiently ambiguous as to be subject to different analysis and reasonably may be cited as supporting or opposing either above stated position.[10] Thus, the decisions of the Second and District of Colum-

10. Indeed, the decisions of the Seventh Circuit are not without ambiguity or duplicity. Until the instant case, the Seventh Circuit reasonably was identified with the Third and Fifth Circuits on the issue herein. In *Airline Stewards and Stewardesses Ass'n.* v. *Transport Workers Union*, 334 F. 2d 805 (7 Cir. 1964), cert. denied, 379 U. S. 972 (1964), the Seventh Circuit held that Title I LMRDA protected only the union-membership relationship, not the union-officer or union-employee relationship. Although *Airline Stewards* involved § 101(a)(5), the Court specifically accepted and adopted the construction placed by the Third Circuit on § 609 and concluded that § 101(a)(5), a section "closely related in subject matter and language" to § 609, does not protect a union officer from removal from office. The Court concurred with the reasoning in *Sheridan* "that neither Title I of the Act (which includes § 101(a)(5)), nor § 609 protects a union officer's status. * * * The language of § 101(a)(5) supports this view. The section refers only to members; it does not mention officers. Moreover, the legislative history buttresses this interpretation." Anomolously, the Seventh Circuit here pays only lip service to its prior holding in *Air Line Stewards*, describing it as "clearly distinguishable," because it involved § 101(a)(5), without acknowledging that its decision in that case had been based on analogies between § 609 and § 101(a)(5). It is significant that Lowry deliberately avoided citing § 101(a)(5), undoubtably because of *Air Line Stewards* and the Seventh Circuit erroneously condoned his ploy. *Cf. McGuire* v. *Grand International Division, Brotherhood of Locomotive Eng.*, 426 F. 2d 504 (6 Cir. 1970), where the Court refused to allow the similarly deceptive pleading (involving Title IV, LMRDA): "If an individual member could bring suit by the simple expedient of framing a claim under Title I where the substance falls under Title IV, the comprehensive administrative and procedural provisions of [the Act] would be rendered meaningless."

bia Circuits tend further to confuse the issue. *Schonfeld* v. *Penza*,[11] 477 F. 2d 899 (2 Cir. 1973); *Navarro* v. *Gannon*,[12] 385 F. 2d 512 (2 Cir. 1967), cert. denied, 390 U. S. 989; *Gleason* v. *Chain Service Rest. Workers*, 300 F. Supp. 1241, aff'd 422 F. 2d 342 (2 Cir. 1970);[13] *Cefalo* v. *Dist. 50 U. M.*

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11. The Court in *Schonfeld* was careful to limit its decision to the "peculiar context of the history of union factionalism presented [therein]." 477 F. 2d at 903. Thus there is doubt as to the precedential value of its holding that Title I protects an officer from being rendered ineligible to run for office because it "affects him *as a member.*" It must also be noted that *Schonfeld* was not brought under § 609, but rather § 102. Thus if *Schonfeld* is precedent for anything it must be described as an exception to *Airline Stewards*, not as following *King*. Indeed, the Court specifically stated that it concurs with the Third and Seventh Circuits' view that "removal from union office gives rise to no rights in the removed official as an official under the Act" because "Title I protects the union-member relationship, but not the union-official * * * relationship."

12. *Navarro* was an action brought by a local union president suing the parent union to enjoin the parent from assuming control of a scheduled local union meeting and interfering with the free speech rights of the local union members. *Navarro* did not raise the issue of whether a union officer can be suspended from office for engaging in conduct protected by Title I and thus is inapposite to the case at bar.

13. In *Gleason*, a local business agent who was charged with serious misconduct, convicted by a union tribunal, expelled from both the office and the union and barred from ever holding office, sued, claiming that he had been expelled from *membership* in violation of his rights under § 101(a)(5). On a motion for preliminary injunction restoring his membership rights *pendente lite*, the district court found that improper procedures had been used at the union hearing in violation of § 101(a)(5), and that the disciplinary proceedings were improperly motivated, in violation of § 609. On appeal, the Second Circuit affirmed the District Court's issuance of the injunction, but only on the basis of the union's violations of § 101(a)(5). With regard to the district court's ruling that the discipline violated § 609 the Court specifically declared that it expressed no opinion on that issue. Thus *Gleason* in no way clarifies the ambiguities raised by earlier Second Circuit cases nor is sufficient to identify the Second Circuit as aligned with either side of the conflict in the other Circuits.

W., ... F. 2d ....., 73 LRRM 2970 (D. C. Cir. 1970).[14] And it is thereby small wonder that the decisions of the District Courts are unclear, contradictory and irreconcilable. See *Kitchen* v. *Radionic Workers*, ...F. Supp. ....., 65 LRRM 2756 (N. D. Ill. 1967); *Hartner* v. *Baltimore Reg. Jt. Bd.*, 339 F. Supp. 1257 (D. Md. 1972); *Keene* v. *Ice Machinery Ind. Empl. Ass'n.*, 331 F. Supp. 1355 (M. D. Pa. 1971); *Grove* v. *Glass Blowers Ass'n.*, 329 F. Supp. 337 (W. D. Pa. 1971); *Cf. Retail Clerks* v. *Retail Clerks International*, 299 F. Supp. 1012 (D. D. C. 1969); *DeCampli* v. *Greeley*, 293 F. Supp. 746 (D. N. J. 1968); *George* v. *Bricklayers*, 255 F. Supp. 239 (E. D. Wisc. 1966).

Since virtually all courts agree that § 101(a)(5) of Title I does not interfere with a union's right to suspend or remove an officer, it is plain that the area of conflict devolves around the interpretation of § 609 of Title VI. The Third Circuit in *Sheridan, supra,* concluded that removal from office was not "discipline" because it clearly was not Congress' intent to include the union officer relationship within the purview of § 101 (a)(5) of Title I and § 609 of Title VI. The Court said [306 F. 2d at 156-157]:

> Our inquiry * * * is * * * narrowed to the question whether the removal of plaintiff from office was a form of "discipline" as that term is used in Section 609.
>
> * * * * *
>
> The language of the Section affords no support for the view that the term "discipline" encompasses removal from

14. *Cefalo*, albeit the Seventh Circuit identifies it as an Appellate Court case concurring with the *King* rationale, never was reviewed by the D. C. Circuit Court of Appeals. The only issue arising out of *Cefalo* upon which the D. C. Circuit rendered a decision was the request for a stay of a preliminary injunction pending appeal therefrom which the Court denied, ordering the case remanded for a trial and decision on the merits. Thereafter, the district court rendered a decision after trial, from which there is no record of an appeal having been taken. Thus the D. C. Circuit cannot be identified as having spoken on either side of the conflict between the other Circuits.

office. The three disciplinary sanctions that are specifically enumerated in that section—fine, suspension, and expulsion—manifest an intention by Congress to protect members *qua* members. Removal from office, on the other hand, is a sanction that can be directed only against the limited group of members who happen to be officers. We see no violation of Section 609 in plaintiff's removal from his office.

Neither does Section 101(a)(4), the right-to-sue provision, support plaintiff's claim that the Act protects his status as an officer. Section 101(a)(4) is part of Title I of the Act. This title, captioned "Bill of Rights of Members of Labor Organizations" [footnote omitted] and particularly Section 101, are designed to protect the rights of union members. The rights are repeatedly described as the rights of "any member" or "every member." No mention is made of rights of union officers or employees. It is of particular interest to note that the right-to-sue provision of the bill that was originally passed by the Senate provided that a labor organization shall not limit "the right of any member *or officer* thereof to institute an action in any court. * * *" [Footnote omitted.] The corresponding provision of the bill that was subsequently passed by the House did not contain the word "officer." [Footnote omitted.] In commenting on this difference between the Senate and House bills, a document prepared by Senator Goldwater's staff and inserted at his request in the Congressional Record states that "the Senate bill extends protection of the right to sue expressly to union officers." 105 Cong. Rec. 16487 (1959). The Conference Committee adopted the House version [footnote omitted] and accordingly Section 101(a)(4) as finally enacted by Congress speaks only of the right of *members*, thus conforming to the terminology used in the other provisions of Section 101.

To be contrasted with the Title I rights are the provisions in Title IV relating to union elections. There, in dealing with candidacy for union office, the statute refers to the "right of any candidate," the right of "every bona fide candidate," and the obligations of a union to "any bona fide candidate." [footnote omitted.] Thus when Congress

> wanted to grant protection to a specific category of union members, appropriate language was used in the statute.
>
> * * * * *
>
> Thus, neither under the "Bill of Rights" provisions of Title I, nor under Section 609, proscribing disciplinary sanctions against union members, is plaintiff's status as business agent protected by the Act. *It is the union-member relationship, not the union-officer or union-employee relationship, that is protected* [emphasis added].

The Third Circuit confirmed its holding that removal from office was not remediable under the Act in *Martire* v. *Laborers' Local Union*, 410 F. 2d 32, 35 (3 Cir. 1969), cert. denied, 396 U. S. 903. The decisions of the Third Circuit have been followed by the Fifth Circuit in *Sewell* v. *Grand Lodge*, 445 F. 2d 545 (5 Cir. 1971) where the Court, citing *Sheridan* with approval, concurred with the line of cases which "indicate a distinction between union-employee and union-officer rights under the Act as compared with 'union-member' rights." Thus, two Circuit Courts of Appeals clearly hold that the suspension or removal of union officers is not proscribed by any of the provisions of Title I or by § 609 of Title VI.

The Ninth Circuit Courts of Appeals, now joined by the Seventh Circuit, inventively disagree.[15] In *Grand Lodge* v.

15. It is interesting to note that the first opinion in this line of cases was that of the Third Circuit in *Sheridan* in 1962 (three years after the effective date of the Act) holding that "Neither Title One of the Act [which includes § 101(a)(5)] nor Section 609 protects a union officer's status. 'It is the union-membership relationship, not the union-officer or union-employee relationship that is protected.'" [*Airline Stewards*, 334 F. 2d at 808]. The holding in *Sheridan* was rejected by the Ninth Circuit in *King* in June 1964 but was followed and apparently adopted in *toto* by the Seventh Circuit in *Airline Stewards* in June 1964 without any mention of *King*. Then in 1971, the Fifth Circuit, aware of the split between the Ninth and Third Circuits (see 445 F. 2d 550-551, n. 21), opted for the rationale of the Third Circuit. And in 1973, the Seventh Circuit in the instant case has joined in the Ninth Circuit's version of the application of § 609. Thus, fourteen years after the Act's inception, confusion over its interpretation persists and the Courts engage in creeping judicial legislation.

King, 335 F. 2d 340 (9 Cir. 1964), cert. denied, 379 U. S. 920, although conceding that "Section 609 itself is not a source of additional independent right, but is an enforcement section," the Ninth Circuit in effect made § 609 such a source by construing the words "otherwise discipline" to mean more in § 609 than the identical words in § 101(a)(5).

Eschewing the same construction, the Seventh Circuit herein "adopt[ed] without repeating [the] * * * analysis of the [purported] different purposes and rationales" of § 101(a)(5) and § 609. However, examination of the legislative history of § 609 of Title VI confirms that it was not intended to do any more for Title I rights than § 102 was intended to do. Section 609, as originally proposed to the House in the Landrum-Griffin Bill (H. R. 8400), was intended as a substitute for § 607 in the Senate-passed bill (S. 1555), which made it a crime for a union to discipline a member for exercising rights guaranteed by the Act.[16] Instead of criminal enforcement, the Landrum-Griffin substitute provided for civil enforcement through the Secretary of Labor.[17] Before passage, however, § 609 was amended to deny such power to the Secretary of Labor, and to give to individual members the right to bring actions in their own name to enforce rights conferred by the Act.[18] This change was made at the behest of Southern Congressmen, who feared that the Secretary of Labor would use the power to sue on behalf of individuals as a weapon in the war against racial discrimination.[19] Thus, although § 609 of Title VI as originally

16. 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1522 (National Labor Relations Board, 1959).

17. Section 609, H. R. 8400, 86th Congress, 1st Session 1 Legis. Hist. LMRDA, p. 676. See also 2 Legis. Hist. LMRDA, p. 1567(1) (remarks of Rep. Griffin).

18. 2 Legis. Hist. LMRDA 1662(2) (remarks of Rep. Cramer).

19. *Ibid.* See also Rothman, *"Legislative History of the 'Bill of Rights' for Union Members,"* 45 Minn. L. Rev. 199, 218-219 (1960).

proposed was intended to complement the civil enforcement provisions of § 102 of Title I, it ended up merely as a duplicate thereof, for reasons completely unrelated to the rights conferred by Title I. If, as the Seventh and Ninth Circuits contend, Congress had intended to protect union officers *qua* union officers by a coverage of § 609 broader than that of § 101(a)(5), it would not have utilized the identical terminology in both provisions.[20] As in Title IV, "when Congress wanted to grant protection to a specific category of union members, appropriate language was used in the statute." *Sheridan*, 306 F. 2d at 157. Congress chose not to use such "appropriate language" in Title VI. But now some of the Circuits, "adventuring beyond the intent of Congress, * * * are legislating by judicial fiat in the guise of interpretation."[21] As a result of such judicial legislation engaged in by the Seventh and Ninth Circuits and contrary holdings by the Third and Fifth Circuits which have

20. Judge Stevens, although concurring with the remand because he believed Plaintiffs should have had an opportunity to produce additional evidence, stated his reasons for refusing to adopt the Court's opinion as follows [Appendix B, *infra*, p. A17]:

> . . . although I certainly agree that the same words may have different meanings in different parts of the same statute, I am not persuaded that the phrase 'to fine, suspend, expel, or otherwise discipline' in § 609 was intended to be any broader than the strikingly parallel phrase 'fined, suspended, expelled, or otherwise disciplined' in § 101(a)(5). One section deals with procedural safeguards and the other with impermissible grounds for discipline. If Congress had intended the coverage of the substantive protection to be significantly broader than the procedural provision—and certainly the *King* rationale identifies a most significant difference—I seriously doubt that the intent would have been expressed in such an obscure way.

21. Dissenting opinion of Judges Knoch and Fairchild, Appendix B, *infra*, p. A20. Such judicial interference in the internal affairs of unions is directly contrary to Congressional intent. See *Calhoon* v. *Harvey*, 379 U. S. 134, 85 S. Ct. 292; *Lewis* v. *AFSCME*, 407 F. 2d 1185 (7 Cir. 1969); see also: *United Steelworkers* v. *Enterprise Wheel*, 363 U. S. 593, 80 S. Ct. 1358 (1960); *United Steel Workers* v. *Warrior & Gulf*, 363 U. S. 574, 80 S. Ct. 1347 (1960); Kroner, "Title I of the LMRDA: Some Problems of Legal Method and Mythology," 43 N. Y. U. Law Rev. 280.

based their review on statutory construction, there now exists a diametric conflict among those four Circuits. Decisions of other Circuits and district courts within the conflicting Circuits confuse rather than clarify the issues; see *supra*, pp. 8-9 and ns. 11-14. Because of the far-reaching effect of these issues on the lives and behavior of organized labor, they deserve resolution by this Court. Fourteen years after the inception of so important a pillar of Congressional labor legislative scheme, it would now appear an opportune time for the Supreme Court to impress its definitive interpretative gloss.

2. The Issue Inherent in the Instant Case Involves a Fundamental Interpretation and Application of an Important Federal Labor Law and Is of Overwhelming Importance to Our National Labor Policy.

The questions of whether Title I protects the rights of officers *qua* officers and whether § 609 of Title VI can be stretched beyond its literal scope to provide a remedy for officers removed from union office have never been reviewed by this Court.[22] Clear definition of the authority of unions to deal with maleficent officers is vital to the operation of labor organizations affecting the requirements of responsible union leadership in the exercise of the collective bargaining process as a necessary incident to the maintenance of industrial peace.

The dangers inherent in the Seventh Circuit decision are apparent. Since thereunder any malfeasor or miscreant can insulate himself from removal from office merely by the guise of announcing as a candidate or speaking out in opposition to the union administration, it can become virtually impossible to

22. Before the clear conflict among the Circuits which is now extant, this Court has declined review of several cases presenting issues of interpretation of Title I or § 609. See: *Nix* v. *Fulton Lodge No. 2*, cert. denied, 406 U. S. 946 (1972); *Sewell* v. *Grand Lodge, cert. denied*, 404 U. S. 1024 (1972); *Navarro* v. *Gannon, cert. denied*, 390 U. S. 989 (1968); *Salzhandler* v. *Caputo, cert. denied* 375 U. S. 946 (1963). For the reasons shown above, the conflict which now exists deserves this Court's review and resolution.

create and maintain a national union policy upon which employers may rely. Clearly, such was not the intent of Congress. Implicit in the careful statutory restriction to the use of the term "member" is the recognition that the rights of union members under LMRDA must be balanced against the rights of the union as an institution representing those members (1) to protect itself from dishonest officers and (2) to ensure that its officers fulfill their duties and implement the policies adopted by the union. See: *Airline Maintenance Lodge 702* v. *Loudermilk,* 444 F. 2d 719 (5 Cir. 1971). To permit an individual to enjoy the prestige of a union office while spending his time subverting the plans and policies of the union would be anathema to national labor policy favoring effective functioning of organizations engaging in collective bargaining.[23] "To hold that a union has no right to discharge an employee [or officer[24]] for insubordination * * * would * * * seriously detract from effective, cohesive union leadership. The result might well be weak, ineffective and fragmentized unions which would be paralyzed

23. The general purposes of the Railway Labor Act, 45 U. S. C. § 802: "To avoid any interruption to commence * * *, to provide for complete independent of * * * employees in the matter of self-organization * * * to provide for the prompt and orderly settlement of all disputes * * *".

The policies of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 141: "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption and promotes the flow of commerce * * * by restoring equality of bargaining power between employers and employees."

The purposes and policies of the LMRDA, 73 Stat. 519, 29 U. S. C. § 402: "* * * that in order to accomplish the objective of a free flow of commerce it is essential that labor organizations * * * and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations."

24. The Fifth Circuit in *Sewell* properly equated the rights of an appointed official with that of an elected officer. *See,* 445 F. 2d at 550.

in bargaining for the rights and welfare of union members against a monolithic front of large commercial corporations in the modern commercial world." *Sewell*, 445 F. 2d at 551-552. Nothing in the Act warrants the apparent conclusion of the Seventh Circuit that Congress intended to give maverick officers[25] or incompetent officers the right to remain in office against the will of a majority of the union's membership or its duly elected officers if his words and actions demonstrate a refusal to perform, or malperformance of, the functions of his office. Indeed, the legislative history indicates that Congress specifically recognized that suspension or removal from office must be taken to prevent wrongdoing officials from remaining in authority. 105 Cong. Rec. 17899 (1959-remarks of Senator Kennedy), 2 Leg. Hist. LMRDA 1433.

In light of the Court of Appeals' erroneous extension of Congressional intent and unfounded differentiation between virtually identical statutory provisions, it is imperative that this Court review the decision below. The issue raised herein is fundamental to maintaining the efficient and cohesive union government prerequisite to effective bargaining and representation.

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25. On this point, concurring Judge Stevens specifically rejected the majority rationale, saying [Appendix B, *infra*, at pp. A17-A18.]:

> . . . it is difficult to believe that Congress intended to address the patronage issue when it enacted the Landrum Griffin Act in 1959. Had it done so, I am inclined to believe that appointed policy-making officials would have been subject to removal by their sponsors. See *Sewell* v. *Grand Lodge*, 445 F. 2d 545, 551-552 (5 Cir. 1971). *Cf. Illinois State Employees Union* v. *Lewis*, [473 F. 2d] at 574. [footnote omitted]. I therefore disagree with the view that the concept of "discipline" described in § 609 is substantially broader than in § 101(a)(5).

CONCLUSION.

For the foregoing reasons, it is respectfully requested that this Court issue its Writ of Certiorari to review the decision below.

Respectfully submitted,

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APPENDIX A

The relevant portions of the Labor-Management Reporting and Disclosure Act of 1959 (Pub. L. 86-257, 73 Stat. 519, 29 U. S. C. Section 401, *et seq.*) are as follows:

TITLE I—BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

BILL OF RIGHTS

Sec. 101.(a)(1) Equal Rights.—Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of Speech and Assembly.—Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * * * *

(4) Protection of the Right to Sue.—No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any

administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against Improper Disciplinary Action.—No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

Civil Enforcement

Sec. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

* * * * *

TITLE VI—MISCELLANEOUS PROVISIONS

* * * * *

PROHIBITION ON CERTAIN DISCIPLINE BY LABOR ORGANIZATION

Sec. 609. It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 shall be applicable in the enforcement of this section.

* * * * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

September Term, 1972 — April Session, 1973

No. 72-1182

J. M. WOOD, JR., P. E. BOWERS, and A. ROBERT LOWRY,
Plaintiffs-Appellants,

vs.

CHARLES LESLIE DENNIS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 72 C 362

ALEXANDER J. NAPOLI, *Judge.*

Argued September 13, 1972
Reargued *en banc* June 1, 1973
Decided November 2, 1973

Before SWYGERT, *Chief Judge,* KNOCH, *Senior Circuit Judge,* and KILEY, FAIRCHILD, CUMMINGS, PELL, STEVENS, and SPRECHER, *Circuit Judges.*

PELL, *Circuit Judge.* Plaintiffs Wood, Bowers, and Lowry appeal from the dismissal of their complaint by the district court. The district court held that it lacked jurisdiction over the subject matter of the action under the Labor-Management Reporting and Disclosure Act of 1959, the Landrum-Griffin Act (29 U. S. C.

§ 401, *et seq.*), and that plaintiffs' membership rights in the union had not been violated. Further, the court found the complaint premature "because of plaintiffs' failure to invoke and exhaust required, reasonable, fair and adequate internal Union procedures and remedies."

The complaint contained four counts. All four counts relate to the removal of Lowry from his position as President of the Transportation-Communication Division (hereinafter "T-C Division") of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter "BRAC") by defendant Dennis, the President of BRAC.

The allegations of the complaint indicate the following. Lowry, as President of the Transportation-Communication Employees Union, had negotiated a merger of that union with BRAC. Among the provisions of the merger agreement was one to the effect that the President of the T-C Division of BRAC would be elected independently by the Division's members and the Division "would continue to handle the affairs of the members of that Division on a basis almost completely the same as at present." Further, it was provided that the President of the T-C Division would be an International Vice President of BRAC and a member of the Executive Council and Finance Committee of BRAC. Lowry began to have disagreements with Dennis, the President of BRAC, as to the operation of the merger agreement. The complaint then alleges that by various acts, both direct and indirect, Dennis had deprived Lowry of his duties and finally of his post entirely.

Count I of the complaint is brought by Wood and Bowers as members in good standing of the T-C Division of BRAC. They contend that the removal of the duly-elected President of the T-C Division constituted a violation of their membership rights protected by Section 101(a)(1) of the LMRDA, 29 U. S. C. § 411(a)(1),[1] in that their voting rights had been nullified.

1. Section 101(a)(1), 29 U. S. C. § 411(a)(1), provides: "(a)(1) Equal rights.

Jurisdiction was invoked under Section 102 of the LMRDA, 29 U. S. C. § 412.[2]

In Count II, plaintiff Lowry contends that his removal from office was discipline for his exercise of his rights as a member of the union, in that he had been "expressing his views, arguments and opinions with regard to the rights of the members of the T-C Division of BRAC guaranteed to them under the terms of the aforesaid Merger Agreement; and because plaintiff advised defendant on or around May 23, 1971, that plaintiff intended to become a candidate for the position of International President of BRAC at the expiration of the defendant's current term of office in 1975." This activity on the part of the defendant was alleged to violate Sections 101(a)(2) and 609 of the Act, 29 U. S. C. §§ 411(a)(2), 529.[3] Counts III and IV are pendent

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Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organizations, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws."

2. Section 102, 29 U. S. C. § 412, provides:
"Civil action for infringement of rights; jurisdiction.

Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

3. Section 101(a)(2), 29 U. S. C. § 411(a)(2), provides:
"(a)(2) Freedom of speech and assembly.

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a

jurisdiction claims brought by Lowry for violation of the BRAC Constitution and malicious slander respectively. Inasmuch as we consider the issues presented by Count II to contain the most significance in the present appeal, as did the parties, we shall begin our analysis with that count.

The principal controversy between the parties is the question of how the language of Section 609 of the LMRDA should be construed. Plaintiff Lowry reads Section 609's prohibition "to fine, suspend, expel, *or otherwise discipline* any of its members for exercising any right to which he is entitled under the provisions of this Act" (emphasis added) as encompassing removal from a union office. Defendant Dennis contends that this court's construction of similar language in Section 101(a)(5), 29 U. S. C. § 411(a)(5),[4] which excluded from its purview protection of the right to hold union office, *Air Line Stewards and Stewardesses Association* v. *Transport Workers Union*, 334 F. 2d 805, 808 (7th Cir. 1964), *cert. denied*, 379 U. S. 972 (1965), should be applied to the words "or otherwise discipline" in Section 609.

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labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

Section 609, 29 U. S. C. § 529, provides:

"Prohibition on certain discipline by labor organization.

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this action."

4. Section 101(a)(5), 29 U. S. C. § 411(a)(5), provides:
"Safeguards against improper disciplinary action.

No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

The gravamen of Count II of plaintiffs' complaint is the attempt to chill Lowry's Title I right of free speech and right to stand for office by the improper discipline of removing him from his union office. In our opinion, the claim of Count II does state a cause of action under the LMRDA. In reaching this conclusion, we join the numerous courts who have adopted the statutory interpretation enunciated in *Grand Lodge of Int'l Ass'n of Machinists* v. *King*, 335 F. 2d 340 (9th Cir. 1964), *cert. denied*, 379 U. S. 920.[5] No point would be served by further extended exegesis on this subject as we regard Judge Browning's opinion for the Ninth Circuit to be an excellent analysis of the relevant legislative history.

Air Line Stewards, upon which Dennis relies, is clearly distinguishable, involving an issue not here present as to whether § 101(a)(5) precludes summary removal of a member from union office. Nevertheless, since the words "or otherwise discipline" were read by this court in *Air Line Stewards* as having a restricted meaning in § 101(a)(5) not including removal from union office, we initially find it necessary to consider the defendant's argument that the same words in another section, § 609 of

5. *Schonfeld* v. *Penza*, 477 F. 2d 899 (2d Cir. 1973); *Sewell* v. *Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers*, 445 F. 2d 545 (5th Cir. 1971), *cert. denied*, 404 U. S. 1024 (1972); *Navarro* v. *Gannon*, 385 F. 2d 512 (2d Cir. 1967), *cert. denied*, 390 U. S. 989 (1968); *Salzhandler* v. *Caputo*, 316 F. 2d 445 (2d Cir. 1963), *cert. denied*, 375 U. S. 946; *Nix* v. *Fulton Lodge No. 2 of Int'l Ass'n of Machinists & Aerospace Workers*, 78 LRRM 2915 (N. D. Ga. 1970), *aff'd*, 452 F. 2d 794 (5th Cir. 1971), *cert. denied*, 406 U. S. 946 (1972); *Cefalo* v. *Int'l Union of District 50, United Mine Workers of America*, 73 LRRM 2964 (D. D. C. 1970), *aff'd*, 73 LRRM 2970 (D. C. Cir. 1970); *Gleason* v. *Chain Service Restaurant Employees Union*, 300 F. Supp. 1241 (S. D. N. Y. 1969), *aff'd*, 422 F. 2d 342 (2d Cir. 1970); *Retail Clerks Union Local 648* v. *Retail Clerks Int'l Ass'n*, 299 F. Supp. 1012 (D. D. C. 1969); *DeCampli* v. *Greeley*, 293 F. Supp. 746 (D. N. J. 1968); *Gulickson* v. *Forest*, 290 F. Supp. 457 (E. D. N. Y. 1968); *George* v. *Bricklayers, Masons and Plasterers Int'l Union*, 255 F. Supp. 239 (E. D. Wis. 1966); Etelson and Smith, *Union Discipline Under the Landrum-Griffin Act*, 82 HARV. L. REV. 727, 735 *et seq.* (1969); *Lew, Landrum-Griffin Protections Against Union Discipline*, 13 N. Y. U. LAW FORUM 16, 50 *et seq.* (1967).

the same statute, should perforce have the same meaning. This argument was presented to the court in *King*, and we agree with the Ninth Circuit that it is a plausible one. We also agree, however, with that court when it said, "[b]ut it is also common experience that identical words may be used in the same statute, or even in the same section of a statute, with quite different meanings. And when they are, it is the duty of the courts to give the words 'the meaning which the Legislature intended [they] should have in each instance.' *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 433, 52 S. Ct. 607, 609, 76 L. Ed. 1204 (1932)." 335 F. 2d at 344-45. (Other citations in accord in footnote omitted.) To the same effect, see the dissenting opinion in *Alberto-Culver Company* v. *Scherk*, ... F. 2d ....., No. 72-1158 (7th Cir., August 2, 1973), Slip Op. at 11.

The words of Mr. Justice Frankfurter are apposite: "[E]xact formulation of the issue before us is necessary to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings." *Automatic Canteen Company* v. *Federal Trade Commission*, 346 U. S. 61, 65 (1953).

The court in *King*, particularly noting the legislative gloss on § 101(a)(5), reached the same result with regard to that section as did this court in *Air Line Stewards*. The court then proceeded with an analysis of the different purposes and rationales of the two sections, which analysis we adopt without repeating it herein, and concluded that punishment of a member by removing him from office if the punishment was for the proper exercise of rights guaranteed under §§ 101(a)(1) and (2) was the subject of redress under the enforcement provision, Section 609. "Punishment for the exercise of these rights is prohibited by section 609 whether inflicted summarily or after a full panoply of procedural protections." *King, supra* at 345. As indicated in *King*, this result is consistent with the legislative history.

Defendant also relies on *Sheridan* v. *United Brotherhood of Carpenters & Joiners of America, Local No. 626*, 306 F. 2d 152

(3d Cir. 1962) which case the *King* court considered. As that court noted, 335 F. 2d at 347, n. 31, Judge Kalodner's opinion in *Sheridan* was not joined in by the other two members of the panel. Judge Hastie concurred in the result upon a different ground and Judge McLaughlin dissented. *Sheridan,* therefore, represents the views of a single judge of the Third Circuit.

It is true the Third Circuit in *Martire* v. *Laborers' Local Union 1058,* 410 F. 2d 32 (3d Cir. 1969), *cert. denied,* 396 U. S. 903, stated that it adhered to the ruling of *Sheridan;* however, the opinion was written by Judge Kalodner and did find a limited nexus between the Act-guaranteed rights of membership and the holding of union office. The decision would accord the right to utilize the remedies of the Act to assert the right to hold office in the future but would find the right nonexistent where the member was removed from office. Finally, it is noted that insofar as the latter matter is concerned, the court's *holding* was that the plaintiff did not have a remedy under § 101(a)(5) by reason of his removal from office. As has already been indicated herein, there is no disagreement on that issue among the courts.

But what is equally significant is that *Sheridan* relies, in no small part, on the fact that the "overriding purpose of the Labor-Management Reporting and Disclosure Act was to insure to members of unions the right to self-government and union democracy." 306 F. 2d at 158. Thus, Judge Kalodner emphasized that the business agent had been removed from office by vote of the membership of the union. In the present case, however, we have the elected representative of the T-C Division being stripped of his office by the President of BRAC, his nominal superior. At least on such facts we find no compulsion to read the words "or otherwise discipline" in § 609 to exclude removal from office. See Etelson and Smith, *Union Discipline Under the Landrum-Griffin Act,* 82 HARV. L. REV. 727, 737-38 (1969). The admirable goals of union democracy and free speech would not be furthered by reading into the broad concept implicit in "otherwise" a restriction that was legislatively mandated for valid and

specific reasons for a separate subdivision of Title I. There is certainly no legislative history to indicate that officers forfeited their Title I rights to equal membership rights and free speech by the mere act of becoming union officials. The Congress when it started its task of revising this country's labor laws was well aware of what Representative Landrum referred to as "a significant lack of democratic processes in certain unions, that one-man dictatorships have thrived—in some instances for 20 to 30 years —and that through intimidation and fear, the rank-and-file union member has been deprived of a voice in his own union affairs." 105 Cong. Rec. 14342 (1959). Ultimately, it is not only free speech and union democracy, but the unions themselves, which will be aided by a decision allowing this limited right of action to remedy the injury of removal from union office when that removal is motivated by a desire to chill membership rights, such as the right of freedom of speech.

It is well at this point to look at the posture of the case as it is before us. We are not concerned with whether, upon an evidentiary hearing, Lowry will be able to prove his allegations regarding his removal from office as "otherwise discipline" because of his exercise of rights guaranteed by the Act, particularly those found in § 101(a)(2) pertaining to freedom of speech. The case before us concerns the dismissal of a complaint which adequately states a claim under the Act for which relief can be granted.

There is implicit in this record a procedural problem of possible donnybrook proportions, at least to those enjoying this type of exercise, which we do not conceive it profitable to pursue extensively. The motion to dismiss, possibly hedging the problem, was based both on lack of jurisdiction over the subject matter *and* on failure to state a claim upon which relief can be granted. The district court did not bypass the hedge. Although stating only the lack of jurisdiction in its conclusions of law, the court in its order dismissed for both reasons. The question is since § 102 gives federal jurisdiction to the district court, did the

court mean in dismissing that it did not have jurisdictional power to adjudicate a claim of a member whose injury was to his officer status or that such claim did not state a claim upon which relief could be granted?

In this situation we will adopt the words of Judge Lindley in *Miles* v. *Armstrong*, 207 F. 2d 284, 286 (7th Cir. 1953):

> "In this situation it was wholly immaterial whether the court dismissed the claim because it was insufficient to state a federal cause of action or whether, believing such to be the case, it dismissed the cause because it had no jurisdiction of the nonfederal action. Obviously, however, plaintiff's rights on appeal would exist in either instance."

In adopting this approach, we are not unmindful that guidelines for determination in the district court of the ruling on a Rule 12(b)(1) motion may substantially vary from those applicable to a Rule 12(b)(6) motion, Fed. R. Civ. P. 5 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1363, at 651 *et seq.* (1969). However, we are satisfied from our reading of the findings of fact and conclusions of law that basically the judge was of the opinion that the suspension of Lowry from office did not violate any membership right protected under § 101(a)(2). To the extent that the court went into the merits of the suspension from office based upon affidavits, and irrespective of the extent to which affidavits may be considered in ruling on a motion to dismiss, the court erred. The matters were controverted, and summary judgment procedure which would have been involved in reliance upon the affidavits was not warranted.

We note that the district court although basically deciding a question of law, which we hold it decided incorrectly, made a finding that "as a member Plaintiff Lowry is not precluded from speaking out in any manner on any issue concerning any union matter." This is true, but suppression of freedom of speech is not limited to noninterference with vocalization. Rights of communication cannot be so restricted as to be meaningless. Thus, denial of a park permit was not rendered proper because

there were other but inconvenient places at which a person could speak. *Collin* v. *Chicago Park District,* 460 F. 2d 746, 752 (7th Cir. 1972). Likewise, Lowry was possessed of an effective voice as an officer. It cannot be said that his freedom of speech as a member is unimpaired when that which made his speech effective is removed for improper disciplinary reasons.

The notion that the right of freedom of speech may be "chilled" is hardly open to dispute. *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965). Dennis also contends that Lowry's complaint was filled with "conclusory allegations," which are not admitted on a motion to dismiss, and was, therefore, insufficient. Although the complaint does not have the detail in it which might be possible in a case such as *Schonfeld* v. *Penza,* 477 F. 2d 899 (2d Cir. 1973), where the history of intraunion strife was particularly extensive, the allegations in Count II are sufficient to survive a motion to dismiss in that they reveal the exact nature of Lowry's grievance and something of the mechanism by which defendant allegedly committed the wrong.

We are not unmindful of the fine line which must be drawn between what might be termed insubordination on the one hand and freedom of speech on the other, a distinction involved in *Sewell* v. *Grand Lodge of the International Association of Machinists and Aerospace Workers,* 445 F. 2d 545 (5th Cir. 1971), *cert. denied,* 404 U. S. 1024 (1972). Although that case was in part disposed of on a statute of limitations point, Judge Gewin on behalf of the court also addressed himself to the secondary point:

> "We fully concur with his contention that each member of a labor union is guaranteed the right of free expression as well as the right to participate freely in the union's democratic processes. Disciplinary action for the exercise of such rights offends the terms of the Labor Management Reporting and Disclosure Act. Moreover, the rights of free expression, and assembly as well as other rights protected by the statute may be exercised fully and freely by any member of the union; the mere fact that a member is

> an appointed or elected official of the union does not destroy his statutory rights. This conclusion, however, does not permit an employee who accepts employment for the performance of certain specified duties to take the largesse and pay of the union, on the one hand, and, on the other, to completely subvert the purposes of his employment by engaging in activities diametrically opposed to the performance of his specified duties." 445 F. 2d at 550-51. (Footnotes omitted.)

Judge Gewin cited the *King* case in support of the recognition of retention of statutory rights by elected or appointed officials.

The determination that the statutory rights are not available because the disciplinary action was proper within the protective mantle of dealing with insubordination is a determination which should be reached only sparingly on a motion to dismiss. In *Sewell,* although there was a motion to dismiss which was sustained in the district court, the court on appeal had the benefit of substantial additional undisputed factual information including the facts found in a companion N. L. R. B. case. We are not so aided in the present case.

Another factor is present in this case which, insofar as we are aware, has not been given separate consideration but which is an aspect of the insubordination-speech issue and that is that Lowry was elected by the members of the division of the union. He was not ousted from that position by any democratic procedure but by the unilateral action of the president of the parent union who was not responsible for Lowry's officer status. That which could be ranked as insubordination would seem to equate more with the appointive official. Again, however, this is a matter which would be controlled by the particular facts which Lowry should be permitted, but was not, to develop.

Finally, Dennis relies on Lowry's failure to exhaust his internal union remedies before bringing suit. That the internal union remedies promise to be fruitless is reflected in the district court's opinion. Defendant Dennis appoints the hearing officer,

who makes recommendations to defendant Dennis, who "will then carefully review the entire record and arrive at a determination and render a decision." After that, Lowry could avail himself of the appellate procedure in the union constitution. But that constitution, which the district court had before it on defendant's motion, revealed that it would not be until 1975 that Lowry could finally exhaust his internal remedies. The complaint itself also was quite specific in the need for immediate relief. These allegations reveal that plaintiffs' complaint was not merely conclusionary on the lack of an adequate internal remedy. "Here the complaint alleges in the clearest possible terms that a formal effort to pursue . . . administrative remedies would be absolutely futile . . . [I]nsistence that petitioners exhaust the remedies administered by the union . . . would only serve to prolong the deprivation of rights to which these petitioner's according to their allegations are justly and legally entitled." *Glover* v. *St. Louis-San Francisco Railway Co.*, 393 U. S. 324, 331 (1969). See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F. 2d 476, 490 (7th Cir. 1970), *cert. denied*, 400 U. S. 911.

We turn now to Count I of the complaint. It is the contention of Wood and Bowers that the removal of Lowry from his position as President of the T-C Division violated their membership rights guaranteed by § 101(a)(1). Aside from this blanket allegation, however, there is little specificity as to which rights have been violated. We must read the complaint carefully to discover these plaintiffs' true theory. Reference is made to equal voting rights of plaintiffs in the International Executive Council, but such rights are more closely derivative from the union constitution than from the LMRDA, which protects direct, rather than indirect, electoral rights. The unarticulated premise of Count I appears to be that the membership rights of the union electorate are violated any time an elected union officer is removed from his position.

However, in *Schonfeld* v. *Penza, supra*, the Second Circuit indicated that the removal of an officer was not a sufficient basis

in itself to support a direct action by a rank and file union member for violation of Title I membership rights to nominate and elect. The court cited *Calhoon* v. *Harvey*, 379 U. S. 134 (1964), for this position. However, the court proceeded to hold that where the removal constituted a form of intimidation of the membership, a basis would exist for proceeding under Title I. The present case is distinguishable, lacking the extra factual basis adverted to in *Schonfeld*, 477 F. 2d at 902-03.

While it is not entirely clear to us that *Calhoon* actually controls the issue of removal of an officer, we do not have to decide that point since it is clear that plaintiffs' theory goes beyond the protective limits of Title I. As noted above, it was expressly contemplated that officers would be subject to summary removal without the procedural safeguards garanteed by §101(a)(5). Summary removal is irreconcilable with the notion that members have an absolute right to their elected officials. In sum, we decline to extend the voting rights provisions of §101(a)(1) to subsequent procedures not directly affecting the exercise of the guaranteed rights. We, therefore, affirm the district court's dismissal of Count I.

The fate of Counts III and IV will be dependent upon the course of litigation with regard to Count II.

For the reasons given hereinbefore, the judgment of the district court is reversed in part and remanded for further proceedings not inconsistent herewith.

REVERSED IN PART, AFFIRMED IN PART, AND REMANDED.

STEVENS, *Circuit Judge*, concurring in the result. The disposition of this case by the district court was somewhat unusual. On the basis of defendant's motion to dismiss, supported by affidavits, and without hearing evidence tendered by the plaintiffs at a preliminary hearing, the district court made "findings of fact"

and dismissed the action for want of jurisdiction. I agree with the majority that the district court committed error. For two reasons, however, I am not prepared to adopt the rationale of the Ninth Circuit in *King*.[1]

First, although I certainly agree that the same words may have different meanings in different parts of the same statute, I am not persuaded that the phrase "to fine, suspend, expel, or otherwise discipline" in § 609 was intended to be any broader than the strikingly parallel phrase "fined, suspended, expelled, or otherwise disciplined" in § 101(a)(5). One section deals with procedural safeguards and the other with impermissible grounds for discipline. If Congress had intended the coverage of the substantive protection to be significantly broader than the procedural provision—and certainly the *King* rationale identifies a most significant difference—I seriously doubt that the intent would have been expressed in such an obscure way.

Second, as I understand the *King* rationale—at least as it applies to Unions which have not adopted such speech-inhibiting regulations as may be permitted by the proviso to § 101(a)(2)[2] —the removal of an appointed union executive who publicly disagrees with the leadership of the union on questions of policy is prohibited. Patronage is by no means an essential attribute of democracy, see *Illinois State Employees Union* v. *Lewis*, 473 F. 2d 561 (7th Cir. 1972), *cert. denied* 410 U. S. 928, but it is difficult to believe that Congress intended to address the patronage issue when it enacted the Landrum-Griffin Act in 1959. Had it done so, I am inclined to believe that appointed policy-making officials would have been subject to removal by their sponsors. See *Sewell* v. *Grand Lodge*, 445 F. 2d 545, 551-552 (5th Cir. 1971). *Cf. Illinois State Employees Union*

1. *Machinist Grand Lodge* v. *King*, 335 F. 2d 340 (9th Cir. 1964). The portion of the *King* opinion which holds that the definition of "discipline" in § 609 is broader than in § 101(a)(5) has not, as far as I have been able to determine, been followed by any other Court of Appeals prior to this decision.

2. See 335 F. 2d at 346.

v. *Lewis, supra,* at 574.[3] I therefore disagree with the view that the concept of "discipline" described in § 609 is substantially broader than in § 101(a)(5).

That disagreement does not necessarily lead to the conclusion that it is clear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson,* 355 U. S. 41, 45-46.

No issue under § 101(a)(5) has been raised by plaintiffs, presumably because it is clear under this court's holding in *Air Line Stewards, et al.* v. *Transport Workers Union of America,* 334 F. 2d 805, 808-809 (1964), that Lowry's suspension pending a full hearing on the Union's charges is not "discipline" within the meaning of that section.[4] Even so, it is possible that additional acts of retribution may constitute discipline. See, *e.g., Martire* v. *Laborers' Local Union 1058,* 410 F. 2d 32, 35 (3rd Cir. 1969); furthermore, the important fact that defendant's actions were directed against an elected rather than an appointed officer may bring this controversy within the Second Circuit's rationale in *Schonfield* v. *Penza,* 477 F. 2d 899 (1973). See *Driscoll* v. *International Union of Operating Engineers, Local 139, et al.,* ..... F. 2d ..... (7th Cir. September 11, 1973, No. 72-1423).

As presently framed, I am inclined to believe that the allegations are insufficient. But since the district court refused to permit the plaintiffs to present additional material for its

3. Since I do not believe Congress intended to address the patronage issue in this statute, I also doubt the validity of the implied exception permitting disciplinary discharges for "insubordination."

4. It may be worth noting that the risk of fiscal misconduct, which explains why the temporary suspension of a union officer is not regarded as discipline within the meaning of § 101(a)(5), see the statement by Senator Kennedy quoted in *King,* 335 F. 2d at 342, does not require or justify a narrow interpretation of the word discipline in other situations, including permanent removal, in which the officer is plainly being punished. Why a person occupying an office of trust should be less entitled to fair procedures than other citizens is difficult to understand.

consideration and dismissed the original complaint with prejudice, I agree that the judgment should be reversed and the case remanded for further proceedings.

KNOCH, *Senior Circuit Judge*. (dissenting) With regret I find myself unable to agree with my colleagues. The majority opinion, as did the opinions in *King* and *Air Line Stewards*, holds that Congress did not intend § 101(a)(5) to preclude summary removal of a member from Union office. *King* has been analyzed, however, as going on to hold that a claim was stated under § 609 on the theory that the words "otherwise discipline" in § 101(a)(5) were not intended by Congress to include removal from office, but the same words were so intended in § 609. Otherwise, the Ninth Circuit reasoned, use of an effective weapon of reprisal against officers exercising rights guaranteed by the Act would have been immunized, without serving any apparent legislative purpose.

I think, basically, this is the thinking behind the decisions of the numerous courts to which the majority refers who have adopted *King* and that this fear dictates the majority's assertion that there is no legislative history to indicate that officers forefeited their Title I rights to equal membership rights and free speech by the mere act of becoming Union officials.

I do not question the cogent argument of the majority that the same words in different context may have different meanings, but I feel that insufficient consideration has been given to the complete legislative history of § 609.

There is apparently no disagreement among the Courts that § 101(a)(5) provides a right to procedural due process only to members as members and that § 609 provides enforcement for rights set out in other portions of the Act. *King*, the majority here, and other decisions in conformity with *King*, adopt the position that if the same words are construed to have the same meaning in § 101(a)(5) and § 609, then officers would

have no remedy against removal from office for exercising rights which would be protected for them as members, if they were not officers as well. These decisions all view such an interpretation as unreasonable, although none of these decisions seem to question the fact that § 609 is an enforcement provision only, which provides no additional rights.

Section 609 was originally proposed to allow civil enforcement through the Secretary of Labor (see 2 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, page 1567) but the section was subsequently amended to provide for individual members to bring actions in their own names only to meet certain objections of some members of Congress. (See 2 Legislative History, LMRDA, page 1662). Thus § 609 was in the process made virtually a duplicate of the provisions of § 102.

The gloss placed on the wording of § 609 by the Circuits following *King* is appealing, but I see us as adventuring beyond the intent of Congress in adopting the majority interpretation. Instead of leaving to legislative action the fashioning of a remedy for the evils envisaged by *King*, we are legislating by judicial fiat in the guise of interpretation. I would affirm the decision of the District Court.

FAIRCHILD, *Circuit Judge*, joins in the dissent of Judge Knoch.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 72 C 362) * *

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF COURT

The complaint herein was filed February 10, 1972, and on February 11, 1972, plaintiffs presented a motion to this Court seeking a temporary restraining order and the matter was continued to February 14, 1972. On February 14, 1972, defendant filed a motion to dismiss this action, or alternatively to strike and dismiss portions of the complaint and in opposition to plaintiff's request for injunctive and other relief. Defendant's motion to dismiss was predicated on the grounds that the Court lacked jurisdiction over the subject matter of the action, the complaint failed to state a claim upon which relief can be granted, and the complaint was premature, plaintiffs failing to invoke or exhaust reasonable remedies and hearing procedures available to them within the union.

Defendant also filed affidavits and a memorandum in support of its motions. Plaintiff filed exhibits in conjunction with its verified complaint. On February 14, the Court heard lengthy, extensive and exhaustive arguments of counsel for the respective parties both on plaintiffs' motion for temporary order, and on defendant's motion to dismiss. At the conclusion of the hearing, the Court having read and considered the verified complaint, exhibits thereto, defendant's motion, affidavits and memorandum and the cases cited by both parties during the course of oral argument, and having carefully considered the oral argument of counsel for both parties, ruled the matter should be dismissed on the grounds put forth by defendant in his

motion, memorandum and oral argument and directed counsel for defendant to submit a draft order on February 18, 1972. On February 16, 1972, counsel for plaintiffs presented a motion and memorandum in support thereof for rehearing on the issue of the Court's jurisdiction. For purposes of determining defendant's motion to dismiss for lack of jurisdiction and for failure of the complaint to state a claim upon which relief can be granted, I have only considered allegations well pleaded in the complaint as well as uncontested facts, such as the Union's Constitution and the suspension letter to Mr. A. R. Lowry dated February 11, 1972. For purposes of plaintiffs' motion for a temporary restraining order, I have also considered all affidavits filed, attachments thereto and plaintiffs' exhibits.

The Court having fully and carefully considered this matter, the pleadings, the written memoranda and oral argument of counsel for the respective parties, now makes the following FINDING OF FACT:

1. This case arises upon a verified complaint requesting the Court to enjoin a continuation of the suspension of Plaintiff Lowry from the offices of International Vice President of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes (BRAC) and President of the Transportation-Communication Division (TC Division) of BRAC, including an order for plaintiff's full reinstatement to these offices with the right to fully perform the functions thereof and to enjoy the full accouterments thereof. The complaint further requests that the Court enjoin the defendant from imposing any disciplinary action upon plaintiff other than under the explicit provisions of Article 19 of the BRAC Constitution. Finally the complaint asks damages for alleged malicious and false statements made by defendant concerning plaintiff. The complaint alleges that the relief sought is to secure rights of plaintiffs granted by Sections 101(a)(1) and 101(a)(2) of the Labor Management Reporting and Disclosure Act of 1959 enforceable under Section 609 of such statute (29 U. S. C., Sections 411(a)(1), 411(a)(2), and 529).

2. Plaintiffs Wood, Bowers and Lowry are members of BRAC.

3. Defendant Dennis is the International President of BRAC.

4. At the time complaint was filed, Plaintiff Lowry held the elected offices of International Vice President of BRAC and President of the TC Division of BRAC.

5. On February 11, 1972, the Defendant Dennis, International President of BRAC, suspended Plaintiff Lowry from the offices of International Vice President and President of the TC Division of BRAC advising Lowry of such action with a notice of suspension which reads as follows:

"Mr. A. R. Lowry
2420 Talcott Road
Park Ridge, Illinois 60068

Dear Sir and Brother:

"Please be advised that in accordance with authority vested in me under the provisions of the Constitution of the Grand Lodge, specifically Article 13, Sections 1, 2, 3, 4, 10 and 13 thereof, and Article 16 of the TC Division By-Laws, I must regretfully inform you that you are hereby suspended from the offices of International Vice President and President of the TC Division of the Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes because of:

1. Conduct unbecoming an officer;
2. Violations of the Constitution of the Grand Lodge;
3. Violation of policies established pursuant to the Constitution;
4. Actions detrimental to the interest of the Brotherhood and its members;
5. And each of the foregoing.

This suspension shall take effect immediately.

"In accordance with the procedure of Article 13, Section 10 of the Constitution of the Grand Lodge, you will be

served with specific written charges within the next thirty days, and afforded a reasonable time to prepare a defense. You shall be afforded due process.

"For your information, I anticipate the appointment of a Hearing Officer to hold hearings upon such charges. You will be entitled to be present during the hearing, to be represented by counsel as permitted by Brotherhood law to present evidence, call and examine witnesses, etc. A transcript of the proceedings will be made by a certified court reporter and a copy of this transcript will be available to you. At the conclusion of the hearing the Hearing Officer will make recommendations to me. I will then carefully review the entire record and arrive at a determination and render a decision. If my decision is not satisfactory to you it is subject to the appellate procedure of the Constitution.

Sincerely and fraternally,
/s/ C. L. DENNIS
International President"

6. The gravamen of the complaint is that Plaintiff Lowry has been suspended from his union offices. The complaint also asserts that defendant has made false and malicious statements about Mr. Lowry. Finally, it is claimed that defendant contemplates ultimate disciplinary action against Plaintiff Lowry through procedures in violation of the Grand Lodge Constitution of BRAC and for reasons which violate the statutory rights of plaintiffs. No claim is made that Plaintiff Lowry has been suspended from membership in BRAC. Defendant's suspension notice of February 11, 1972, above set forth, only suspends Plaintiff Lowry from the union offices which he held.

7. I find that Plaintiff Lowry has been suspended from union office, but not from union membership.

8. There are no well pleaded facts in the allegations of Counts I, II, III and IV of the complaint reflecting that any alleged actions engaged in by defendant deprived any of the plaintiffs of any membership rights protected by Title I of the

Act, Sections 101(a)(1), et seq.; 29 U. S. C. 411(a)(1), et seq. The Act does not protect the right of union officers as officers, and the Act does not guarantee that any member be or remain a union officer. Title I of the Act also does not guarantee the right of a member to run for office, nor does the Act protect the right of union members to have a specific person act as an officer of the union.

9. I further find that as a member Plaintiff Lowry is not precluded from speaking out in any manner on any issue concerning any union matter, and that as a member, despite his suspension from office he is not precluded from running for higher office in 1975 or any other time pursuant to the Union's Constitution, Article 10, Section 3.

10. The complaint reflects and plaintiffs conceded in open court that they are not asserting a violation of Section 101(a)(5) of the Act; 29 U. S. C. 411(a)(5), and the court so finds.

11. Allegations in the complaint concerning defendant's actions as constituting violation of laws against slander and violations of contract rights set forth in the Merger Agreement of February 21, 1969, and the Constitution of BRAC are not encompassed within the provisions of Title I, Sections 101(a)(1) or 101(a)(2) of the Act; 29 U. S. C. 411(a)(1), 411(a)(2), and present no federal question. There is no diversity of citizenship alleged or shown.

12. A union officer of BRAC feeling himself aggrieved or in disagreement with union policies as set forth by the Chief Executive Officer of the Union as permitted or required by Article 13 of the Constitution, has an adequate method of internal handling within the framework of the Constitution, Article 16, Sections 6 through 18.

13. I find that the internal union remedies and hearing procedures available to plaintiffs under the Union Constitution are fair, adequate and reasonable, including appeal rights thereunder.

CONCLUSIONS OF LAW:

1. This court lacks jurisdiction over the subject matter of this action under the Labor Management Reporting and Disclosure Act of 1959 and under the doctrine of pendent jurisdiction.

2. Plaintiff's membership rights protected by the Act have not been violated.

3. Plaintiffs have failed to exhaust reasonable and established internal union remedies and hearing procedures.

IT IS THEREFORE ORDERED:

This action is dismissed for lack of jurisdiction, for failure of the complaint to state a claim for which relief can be granted and as premature because of plaintiffs' failure to invoke and exhaust required, reasonable, fair and adequate internal Union procedures and remedies.

Enter:
ALEXANDER J. NAPOLI
United States District Judge

Dated: February 23, 1972